

# OFFICE OF THE ATTORNEY GENERAL



*Agriculture &  
Industries  
80-00309*

LEE L. HALE  
DEPUTY ATTORNEY GENERAL

WILLIAM M. BEKURS, JR.  
EXECUTIVE ASSISTANT

WALTER S. TURNER  
CHIEF ASSISTANT ATTORNEY GENERAL

JANIE NOBLES  
ADMINISTRATIVE ASSISTANT

CHARLES A. GRADDICK  
ATTORNEY GENERAL  
STATE OF ALABAMA

APR 1 1980

ADMINISTRATIVE BUILDING  
64 NORTH UNION STREET  
MONTGOMERY, ALABAMA 36130  
AREA (205), 834-5150

Honorable McMillan Lane  
Commissioner  
Department of Agriculture  
and Industries  
Beard Building  
P. O. Box 3336  
Montgomery, Alabama 36109

Social Security - Law Enforcement -  
Wages

Adjusted FICA tax payments on sub-  
sistence for law enforcement  
officers discussed.

Dear Mr. Lane:

This office has received the opinion request regarding  
FICA tax deductions. Your request presents the following facts:

Mr. J. Ben Swindle, Director of the  
State Agency for Social Security, sent  
a memorandum dated February 11, 1980  
to the State Personnel Department, the  
ABC Board, the Department of Conserva-  
tion and Natural Resources, the Depart-  
ment of Agriculture and Industries, the  
Public Service Commission and the State  
Comptroller.

The memorandum reads, in pertinent  
part, as follows:

"The Federal Social Security Administra-  
tion has ruled that the five dollar per  
day subsistence allowance, paid to law

enforcement officers, is wages, and must be reported as wages for Social Security purposes.

"Please file adjustment reports to reflect these payments to each officer, by quarters, for calendar years 1975, 1976, and through September 30, 1977. We began reporting these payments as wages October 1, 1977.

"These reports must be filed by March 31, 1980. Your early attention will be appreciated."

Your first question is:

Since the Federal Social Security Administration has ruled that the \$5/day must be considered wages and since this amount in prior years has already been paid to the employees without the FICA tax deduction under a previous State interpretation that the above amount was not wages, must the Department of Agriculture and Industries pay both the employer and employee portion, to include penalties, if any?

It is the opinion of this office that the Department of Agriculture and Industries must pay both the employer and employee portion, including any penalties. Section 3102(b) of the Federal Insurance Contributions Act (26 U.S.C. 3102b) states that every employer required to deduct tax from the employee shall be liable for payment of such tax. See Section 218 of the Social Security Act and Opinion to Miss Edna Reeves, Director of State Agency for Social Security under date of January 30, 1976, copy enclosed.

Your second question is:

If your answer to the first question is in the affirmative, can current year appropriations be used to pay for prior year obligations in this case? Must the state agencies go through the Board of Adjustment regarding these payments?

It is the opinion of this office that current year appropriations may be used to pay these obligations without the necessity of going through the Board of Adjustment. Since the Department of Agriculture and Industries was operating under a prior ruling that the subsistence allowance was not wages, the FICA tax payments did not in fact accrue until the current year when such ruling was invalidated by the Federal Social Security Administration.

Your third question reads as follows:

Does the Department have the authority to require that the employees in question pay, or allow the Department to deduct from future wages, the employee portion of FICA taxes not previously deducted, under the above decision by the Federal Social Security Administration?

Code of Alabama 1975, Section 36-28-7 provides in pertinent part the following:

"... (b) The contribution imposed by this section shall be collected by the state by deducting the amount of the contribution from wages as and when paid, but failure to make such deduction shall not relieve the employee from liability for such contribution. The persons or department preparing the payrolls through which employees covered by the agreement are paid shall make such reports to the state agency as are deemed necessary by said agency upon forms supplied by said state agency.

"(c) If more or less than the correct amount of the contribution imposed by this section is paid or deducted with respect to any remuneration, proper adjustments or refund if adjustment is impracticable shall be made, without interest, in such manner and at such times as the state agency shall prescribe."

Honorable McMillan Lane  
Page Four

Under Section 36-28-7(c), supra, the State Agency for Social Security is given the authority to prescribe the times and the manner in which proper adjustments are to be made. It is, therefore, the opinion of this office that the procedure to be followed must be promulgated by the State Agency for Social Security.

Your last question is:

If the answer to question 3 is in the affirmative, to what extent are the state agencies in question required to pursue this matter, particularly as to persons no longer employed by the State?

Since the answer to question 3 is not in the affirmative, this question is moot.

I hope that this response fully answers your inquiries. If not, however, please do not hesitate to contact us.

Sincerely,

CHARLES A. GRADDICK  
Attorney General

By-



CAROL JEAN SMITH  
Assistant Attorney General

CJS:sa

Enclosure



WILLIAM J. BAXLEY  
ATTORNEY GENERAL

January 30, 1976

GEORGE L. BECK  
DEPUTY ATTORNEY GENERAL

E. RAY ACTON  
EXECUTIVE ASSISTANT

WALTER S. TURNER  
CHIEF ASSISTANT ATTORNEY GENERAL

LUCY M. RICHARDS  
CONFIDENTIAL ASSISTANT

JACK D. SHOWS  
CHIEF INVESTIGATOR

Miss Edna M. Reeves, Director  
State Agency For Social Security  
Montgomery, Alabama 36104

Employee and employer contributions to  
Social Security and penalties for non-  
compliance discussed.

Dear Miss Reeves:

This will acknowledge your recent letter requesting opinion on the following questions:

"1. Doesn't the Federal Social Security Law require the withholding of contributions each pay period with matching contributions to be held in a trust fund and remitted at the time required by State Agency in order that these funds may be transmitted to the Federal authorities when due?

"2. Is it not true that failure to deduct contributions from employees salaries when paid is a direct violation of both State and Federal laws governing our Federal-State Social Security Agreement and Agreements between the State of Alabama and political subdivisions?

"3. Does not the failure to handle these payments as indicated in contracts create grounds for Federal court action?"

As to your first question, the Federal Insurance Contributions Act provides that the employee's contribution shall be collected by the employer, by deducting the tax from the wages as and when paid. An equal amount of tax is imposed upon the employer.

The Agreement providing plans of coverage of political subdivisions and of state and local instrumentalities provides that the political subdivision deducts an amount not exceeding that imposed by the Federal Insurance Contributions Act and that said deduction be from the wages as and when paid; that appropriations of matching funds shall be made by the political subdivision and that reports be made as required under provisions deemed necessary by the state agency or the federal agency.

I find no requirement that employer matching contributions be collected and put in an account prior to making report to the State Agency For Social Security. Employee portion is matched by the appropriated employers' portion and mailed on a quarterly basis and is due by the 16th of the month following closing of the quarter.

A custodian is designated in the Resolution to enter into the Agreement to withhold and report and forward funds to the State Agency for Social Security on the quarterly basis.

The answer to your second question is also in the affirmative.

Section 3102(a) of the Federal Insurance Contributions Act requires that the employer collect of the taxpayer, by deducting the amount due from him as and when paid. Section 3102(b) holds that every employer required to deduct tax from the employee shall be liable for payment of such tax. And Section 3111 of the above-named Act provides that the tax to be paid by employer be equal to the amount deducted from the employee's wages.

Title 55, Section 480(c)(1) and (d), Code of Alabama 1940, as amended provides:

"(c)(1) Each political subdivision or instrumentality as to which a plan has been approved under this section shall pay into the contribution fund, with respect to wages (as defined in section 477 of this title) at such time or times as the state agency may by regulation prescribe, contributions in the applicable agreement entered into by the state agency under Section 478."

Miss Edna Reeves  
Page 3  
January 30, 1976


"(d) Delinquent payments due under paragraph (1) of subsection (c) may, with interest at the rate of 6 per annum, be recovered by action in a court of competent jurisdiction against the political subdivision or instrumentality liable therefor or shall, at the request of the state agency, be deducted from any other moneys payable to such subdivision or instrumentality by any department or agency of the state."

It should be noted that the Federal Government requires the State to submit its moneys within a certain time. The penalty of 6 per cent attaches to the state also. See Section 218(j) of Social Security Act.

My answer to your third question is also in the affirmative for the same reasons as discussed in my answer to the second question.

Yours very truly,

WILLIAM J. BAXLEY  
ATTORNEY GENERAL  
BY -

  
DAVID W. CLARK  
ASSISTANT ATTORNEY GENERAL

DWC:scb